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CHARLES ELMORE CROPLEY
CLERK

# SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1944

## No. 194

MARY P. FINLAYSON AND D. A. FINLAYSON, HER HUSBAND,

*Appellants,*

*vs.*

TOWN OF MONTICELLO, A MUNICIPAL CORPORATION UNDER THE LAWS OF THE STATE OF FLORIDA.

APPEAL FROM THE SUPREME COURT OF THE STATE OF FLORIDA.

## APPELLANTS PETITION FOR REHEARING OF MOTION TO DISMISS AND ORDER DISMISSING

WELDON G. STARBY,
*Counsel for Appellants.*

IN THE

# UNITED STATES SUPREME COURT

MARY P. FINLAYSON and D. A. FINLAYSON, Her Husband,

*Appellants,*

VS.

TOWN OF MONTICELLO, A Municipal Corporation under the Laws of the State of Florida.

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Your petitioners, Mary P. Finlayson and D. A. Finlayson, her husband, appellants in the above entitled cause, in this their petition for a rehearing on the motion to dismiss their appeal and the Order of the Court dismissing said appeal, would respectfully show that they believe and would aver that the Court has been led to enter its Order dismissing the appeal in this case by a failure to discern the actual Federal question that the petitioners urge as a basis for this appeal.

That the Federal question urged is involved and grows out of the statement of fact set out in the assignment of error, and borne out by the record, to the effect that the municipality *acquired no authority* to levy the assessments sought to be enforced because it failed to adopt, not only in the manner but at all, the *jurisdictional prerequisite* resolution required by the statute as interpreted by the Supreme Court of Florida in several cases (see Appendix A, attached for the convenience of the Court, infra, page 10) "before it could legally adopt" the resolution levying the assessment.

That the Federal question involved naturally follows: Inasmuch as the resolutions levying the assessments were adopted without the authority of the statute alleged in the Bill as authority, the assessments were made without authority of law and, if enforced, would result in depriving the appellants of their property without due process of law, in violation of the Fourteenth Amendment of the Constitution of the United States in its provision that no State shall deprive any person of property without due process of law.

That this failure to obtain the authority of the statute to levy the assessments was constituted the main defense to the action, which issue was made on the very threshhold of the case by the allegations of the Bill, in its second paragraph, that the assessments were levied under authority of Chapter 9298, Laws of 1923, and the answer, in its second paragraph, denying that any authority had been obtained and detailing the subsidiary facts culminating in the ultimate fact that no authority had been obtained. (See Appendix B, infra, page 12.)

That the chancellor in the trial court below, upon the inspection of the records of the municipality pertaining to the levy of the assessments, could not find the jurisdictional prerequisite resolution required by Section 2 of the statute as interpreted by the Supreme Court of Florida in the only interpretation ever announced of the section by the Court, and, in effect, decided that the assessments were levied without authority of law and dismissed the bill solely on that ground.

That upon the case reaching the Supreme Court of

Florida on the appeal by the municipality, that Court made but one brief reference to the Chancellor's decree and the grounds on which he rested it contained in the following:

> "The Chancellor held the view that the evidence introduced by the plaintiff was insufficient to meet the rule announced in the Fort Myers case. That controversy is readily distinguishable from this one for reasons given in our opinion, Finlayson vs. Town of of Monticello, 137 Fla. 697, 189 So. 21."

That the failure of the Court to reverse the Chancellor in either his finding of law, that the rule announced in the Fort Myers case was still in effect, or his finding of fact that the evidence introduced by plaintiff was insufficient to meet the rule, and the sidestepping in saying "that the controversy was readily distinguishable from this one for reasons given in our opinion, Finlayson vs. Town of Monticello, 137, Fla. 697, 189 So. 21" was to leave the one and only ground on which the Chancellor rested his decree dismissing the bill unquestioned; and excluded it from any part in the discussion of the opinion.

That what the controversy was is a question to be answered by the record, inspection of which lies in the province of this Court; that the bill and answer (see Appendix B, infra, page 12) determine what the controversy was.

That the opinion in Finlayson vs. Town of Monticello, supra, was entirely valueless as precedent: It was rendered on merely a question of pleading as to the necessary averments of the bill, and not on what might be pleaded by way of defense; and was not the opinion of the Court, but of three Justices of an equally divided Court, three

Justices only concurring in the opinion, while the Chief Justice dissented and the other two Justices of the Six Justice Court specially concurred in only the result of not reversing the Chancellor (see Appendix C, infra, page 14) which decided nothing except that the Chancellor below would not be reversed (see Appendix C, infra, page 15 for the conclusion of the opinion).

That even did the opinion from which the appeal is taken reverse the doctrine announced in the citations set out in Appendix A, infra, page 10, it comes too late to have that effect in the instant case inasmuch as appellants' property rights under the protection of the Constitution of the United States are affected and the previous rulings of the State Supreme Court were the law of Florida at the time of the levying of the assessments, the bringing of the suit, and the Chancellor's decree dismissing the bill; it cannot affect this suit; it is the status of the law at the time of the levying of the assessments, as interpreted by the Supreme Court of Florida, that governs in this case to determine whether the appellants are entitled to the protection of the Constitution of the United States in their property rights.

That the finding of the opinion here appealed from, "Our perusal of the record has convinced us of the propriety of the governing authority in its every action from the inception of the paving program until its accomplishment. The requisite resolutions, plans, specifications, and the like seem to have been adopted in the manner and at the time required by the law, and evidently all provisions for publication of notices and assessment rolls were scrupulously obeyed.

The governing authorities, sitting as an equalizing board, after due notice of their meeting, considered and determined complaints and made necessary adjustment in assessments. Therefore, in the main, no defect in the procedure resulting in the liens against the property of appellee has been discovered.",

and have no reference to the failure of the municipality to obtain the authority of the statute to levy the assessments, as the "inception of the paving program" is fixed as the adoption of the resolution required by *Section 3* of the statute as follows:

"The statute to which reference will often be made in our discussion of the salient points of the appeal is Chapter 9298, Laws of Florida, Acts of 1923, now appearing in Florida Statutes, 1941, and in F. S. A. as Sections 170.01 et seq. We say that repeated reference will be made to the law because it was to foreclose liens created under it that suit was brought by the town, appellant, against the appellee property owner and her husband. Prior to the creation of these liens, according to the bill of complaint, resolutions complying with Section 3 of the act had been adopted by the town council. They provided for the improvement of certain streets and sidewalks on which were located two lots then owned by the predecessors in title of appellee. Each of them too, provided that two-thirds of the cost of construction should be assessed against the owners of lots on the street, according to front footage, and that the remaining one-third should be borne by the municipality."

That it will be observed also that the jurisdictional pre-

requisite resolution is entirely wanting; that it was not required by *Section 3*, but by Section 2.

That this Court should not be mislead by the repeated attempt in the opinion to dissociate the *subsidiary facts leading up to the ultimate fact of no authority* set out in the answer (Appendix B, infra, page 12) and make them independent steps to be taken in the course of adopting the resolution under Section 3.

That all the aftermaths of levying the assessments such as payment by persons of the assessment against their property, etc., detailed in the opinion cannot supply authority to levy the assessment.

> "Municipal corporations have no inherent power to levy special assessments; and in order that such assessments be valid and enforceable, they must be made under pursuance of legislative authority and the method prescribed by the legislature, substantially followed. City of Coral Gables vs. Coral Gables, Inc., 159 Fla. 30, 160 So. 476; Car v. City of Kissimmee, So. Fla. 756, 86 So. 699."—Simpson et al v. City of Brooksville, et al, 188 So. 795."

That the long lapse of time between levying the assessments and the present litigation growing out of it is not chargeable to the appellants, who are defendants, not plaintiffs seeking affirmative relief, and entered their defense promptly upon the commencement of proceedings by the town.

That whatever laches were incurred are chargeable to the municipality, which, *in disregard of the direction of*

*Section 10 of the statute* (Florida Statutes, 1941), delayed filing its bill several years after the first default in the payment of installments by the property owner.

That estoppal does not obtain since the defense is based on the claim that the assessments are void (See Appendix D, infra, page 16).

That the cases Campbell v. Olney, 262 U. S. 352; North Laramie Land Co. v. Hoffman, 268 U. S. 276, 283; Utley v. St. Petersburg, 292 U. S. 106; Anderson National Bank v. Luckett, 321 U. S. 233, 247, cited by the Court in support of its Order dismissing the appeal, do not involve the Federal question urged in this appeal; the two relating to improvements assessments, the Olney and the St. Petersburg, are each founded upon a statute diametrically and fundamentally different from the statute involved in this appeal in their provisions; the two each presuming validity, places the burden of impeaching the assessment on the property owner, while the statute herein under consideration not only places the burden of the jurisdictional prerequisite finding of the amount of the actual benefit that would accrue to the assessed property, and making sure that the assessment would not exceed the benefits found to accrue, on its own initiative, before it can obtain the authority of the statute to levy the assessments on the municipality, as hereinbefore set out, but the burden of testing the validity of the assessment by promptly commencing proceedings to enforce the assessments upon the first default in the payment of installments, Florida Statutes, 1941, Section 170.10.

That the rule announced in the other two cases, that this

Court accept the interpretation placed on the State Statute by the highest Court of the state is in appellants' favor, calling, as it does, for the acceptance by this Court of the specific holdings of the Supreme Court of Florida in its interpretation of Section 2 of the statute under consideration set out in Appendix A, Supra, page 10; there is no other specific interpretation set out in the opinion, but an assumption of an arbitrary discretion not to apply the interpretation in the incident case on the alleged fact not borne out by the record, that the controversy does not call for it, a fact to be reviewed by this Court under its well settled rule "the Supreme Court of the United States may review a decision of a State Court upon the finding of fact if a Federal right has been denied as a result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary in order to pass upon the Federal question to analyze the facts, Aetna Life Insurance Company, et al., vs. Pearl Stone, Administratrix Estate W. J. Duncan, Deceased, 266 U. S. 389, 69 L. Ed. 343, 45 S. Ct. 129.

That this appeal is taken not on account of any denial to the appellants of an opportunity to be heard in defense of their property rights as against the assessments sought to be enforced, but to obtain the protection of the Constitution of the United States against an assessment levied against their property *without authority of law*, because of the failure of the municipality, *on its own initiative*, to adopt the *jurisdictional* prerequisite resolution finding the *amount* of the special benefits that would actually accrue to the assessed property from the improvements, and that the assessments would not exceed the benefits so *found*.

WHEREFORE, your petitioners pray that the Order entered herein on October 9, 1944, dismissing the appeal, be vacated and set aside; and that the cause be restored to the docket of the Court to be further heard at such time as to this Honorable Court may seem fit.

And your petitioners will ever pray.

Weldon G. Starry

Counsel for Petitioners

STATE OF FLORIDA
COUNTY OF LEON

I, Weldon G. Starry, counsel for appellants in the above entitled cause, do hereby certify that the foregoing petition for a rehearing of the motion to dismiss and the Order dismissing the appeal is presented in good faith and not for delay.

Weldon G. Starry

Subscribed and sworn to before me this 28 day of October, A. D. 1944.

Lila M. Davis

Notary Public, State of Florida at Large. My Commission expires:

Notary Public State Florida at Large
My Commission expires Dec. 8th, 1944

## APPENDIX A

"Special Assessments for local improvements although resting on the taxing power are distinguishable in many respects from a general tax imposed for state, county, or municipal purposes. The fair and just foundation on which special assessment for local improvements rests, is special benefits accruing to the property benefitted, that is to say, benefits received by it, in addition to those received by the community at large." City of Ft. Myers v. Florida, et al, 95 Fla. 704, at page 721-22 of the opinion, 117 So. pages 97-104.

"Chapter 9298, Acts 1923 providing for a Supplemental Additional and alternative method of making local improvements in cities and municipal Corporations and for providing for Special assessments for the costs thereof, authorizes municipalities to make assessments against private property for local improvements *on the basis only of the special benefits flowing to the property assessed* on account of such local improvements." Atlantic Coast Line Railroad Co. vs. City of Lakeland 94 Fla. 347.

"In some jurisdictions, it is the rule that special or peculiar benefits actually accruing and determined after a notice and hearing is essential to the validity of a special assessment, while, in other jurisdictions, it is held that the presumption of special benefits grounded upon a legislative determination thereof is sufficient to justify an assessment in proportion to the front footage or according to any other fair and reasonable rule. Dillon on Municipal Corporations, 5th Edition, Volume 4, page 2615. *The statute under consideration is controlled by the former*

*rule.*" 17th Hdnt. City of Ft. Myers vs. State of Florida, supra.

"Whether private property which is assessed or to be assessed for any part of the costs of a proposed or fully completed public improvement is in fact specially benefitted by the paving of a street on which the property assessed or to be assessed abutts or by any other local public improvement *is a question to be ascertained and established as any other fact may be established, that is to say,* by competent evidence of probative value *sufficient to establish the fact; it does not rest in the mere assertion of the municipal authorities.*" Atlantic Coast Line Railroad Co. vs. City of Lakeland Supra 2nd Hdnt.

"Under Chapter 12719 Acts of 1927" (or its prototype 9298 Acts 1923) "it is mandatory that before the resolution authorizing public improvements provided in subsection B" (or Section 3, 1923 Acts) "can be legally adopted the city commission must have determined that benefits will accrue to the property improved, the amount thereof, how such benefits will be prorated and that Special Assessments will be made in proportion to said benefits as directed by Subsection A" 7 Hdnt. (or Sec. 2, 1923 Acts, City of Fort Myers vs. State of Florida, et al, Supra).

"It is contended that the bill of complaint fails to allege the adoption and publication by the town's governing authority *of a resolution* determining that benefits *would accrue to the property,* the amount of the benefits, that the special assessment would be made proportionate to the benefits, and that they would not exceed the benefits."

"This contention is well founded for the bill of complaint does not contain any allegation relating to this prerequisite jurisdictional resolution."

*"It is mandatory that a resolution in conformity with this statutory requirement be adopted, City of Ft. Myers v. State of Florida 95 Fla. 704, 117 So. 97."*

"We think it imperative under the applicable statute that there must have been a specific finding of benefits that the assessments made were not in excess of the benefits found and that any assessment imposed without regard to the benefits found is arbitrary and invalid."

## APPENDIX B

The bill alleges,

"That by authority of and pursuant to Chapter 9298, Laws of Florida, Acts of 1923 as compiled in Sections 3022 to 3042, both inclusive, compiled General Laws of Florida, 1927, plaintiff, through its governing authority during the years 1925, 1926 and 1927 provided for constructing, grading, paving and otherwise improving certain streets, avenues and highways in said Town, and for grading, laying and paving sidewalks therein, and provided for the payment of costs of such streets and sidewalk improvements, as hereinafter set forth." Paragraph second of the bill.

And in response thereto the answer alleges:

"Answering paragraph 2 of said bill of complaint, respondents say, that it is untrue, in that the acts and doings of plaintiff through its governing authority, alleged in said paragraph, were not by authority and pursuant to Chapter 9298, Laws of Florida, Acts of 1923, as compiled in sections 3022 to 3042, both in-

clusive, Compiled General Laws of Florida; that the plaintiff did not and has never acquired any authority under said statute to do the acts alleged to have been done; that the plaintiff, through its governing authority, failed utterly to comply with the conditions precedent or jurisdictional prerequisites prescribed by the statute before attempting to invoke the authority of said statute to do said acts; that the plaintiff, through its governing authority, gave no notice of a hearing to determine the amount of special benefits that would actually accrue to the property abutting on the streets by the improvements of such streets as alleged to have been provided for in said paragraph of the bill; that the plantiff, through its governing authority failed to hold any hearing to receive and consider any testimony from which it would determine the amount of such special benefits to be prorated among the various pieces of property, including that of respondents, abutting on such streets, and failed to receive and consider any such testimony, and failed to determine the amount of any such special benefits; that no special benefits were pro-rated among the various pieces of abutting property, by which the proportion of the special benefits that would accrue to the same, to the assessments to be made against the same, could be ascertained; but that the assessment was made in proportion to the costs of such improvements and in entire disregard of any special benefits which might accrue to the abutting property from the improvements. That by reason of the foregoing, the acts, alleged to have been done in said paragraph 2, were done without the authority of said act, chapter 9298, Laws of Florida, 1923, and are a nullity so far

as they affect the abutting property, including that of the defendants, to the extent of authorizing a valid assessment to be levied against the same for the purposes in the bill alleged." Second paragraph of Answer.

## APPENDIX C

The order is affirmed.

WHITFIELD, BROWN, and BUFORD, JJ., concur.

CHAPMAN, J., concurs specially.

TERRELL, C. J., dissents.

BROWN, Justice (concurring).

I am inclined to the view that the court below was justified in denying the motion to dismiss in view of the holding of this Court in Sawyer v. Town of Mount Dora, 108 Fla. 456, 146 So. 563, 148 So. 209. See also Summerland, Inc., v. City of Punta Gorda, 101 Fla. 543, 134 So. 611. I do not think we are called upon to discuss what if any defenses the appellants may or can assert by way of answer to the bill, or the sufficiency thereof.

CHAPMAN, Justice (concurring specially).

I agree to the conclusion reached in the opinion prepared by Mr. Justice THOMAS in the case at bar. The bill of complaint seeks to enforce a lien for improvements in the form of pavement of streets and sidewalks against the abutting property of the appellant situated in the City of Monticello, Florida. It is contended here that the costs

of the special assessments are in excess of the increased value of the property by reason of the special benefits derived from the improvements.

The power to create such liens can or may have or possess the apparent authority to deprive an owner of his property without a hearing and the effect thereof is the taking of property without due process of law. If it can be shown in this case that the costs of special assessments exceed the increased value of the property by reason of the special benefits derived from the improvements, then the effect thereof is an arbitrary and unwarranted exercise of legislative power, or if it can be made to appear that there has been some action on the part of the legislative power in connection with the levy of the special assessments amounting to denial of the equal protection of the law, then the courts are open to protect the constitutional rights of the property owner. See Atlantic Coast Line R. Co. v. Gainesville, 83 Fla. 275, 91 So. 118, 29, A.I.R. 668; Atlantic Coast Line v. City of Lakeland, 94 Fla. 347, 115 So. 669; City of Fort Myers v. State, 95 Fla. 704, 117 So. 97; Town of Gulfport, etc. v. Mendels, 127 Fla. 730, 174 So. 8.

It is the settled law that special assessments can be sustained only upon the theory that property assessed receives some special benefit from the improvement differing from the benefit that the general public enjoys. If the foundation of the right to levy special assessments does not exist, this and other defenses supra can or may be interposed by an answer and evidence taken in support thereof. See vol. 5, McQuillin, Municipal Corporations (2nd Ed.) pages 645-6, par. 2193.

## APPENDIX D

It is almost universally held that, if the assessment is wholly void, estoppel does not obtain. In Corpus Juris, where the authorities are collated and digested, we have:

"Subject to some limitations which have not met general acceptance, it has been very generally held that the doctrine of estoppel has no application in those cases, where the assessment is wholly void, as * * * * * * * * *where the improvement district has failed to secure the power to make a levy* * * * * * * * * *where the assessment was made in a manner* which renders it invalid, *where the assessment is void for failure to give an opportunity for a hearing on the question of benefits* * * * * * * * * *or because it was not made with a view to any benefits but solely according to location.*" 44 C. J. 687, Sec. 3160 (bb).

"While in some jurisdictions, important limitations are placed upon the rule, the great weight of authority is to the effect that, if the assessment *is for any reason wholly void,* a property owner who stands by and offers no objection to the making of an improvement which benefits his property, *will not,* under the general rule, be estopped from objecting to the assessment against his property; and, except in a few jurisdictions, this principle has been applied with great frequency where the assessment *was void for an entire lack of jurisdiction to make the improvements,* on the theory that the property owner is not more estopped from questioning the jurisdiction of the Council or from questioning the jurisdiction of the Council or its governing body upon the facts than he would be from questioning the jurisdiction of a judicial tribunal which should attempt to deprive him of his property." 44 C. J. 692, Sec. 3164 (bbb).

The Supreme Court of Florida, itself, holds that way:

Gulfview Apartments, Inc. et al vs. City of Venice, 108 Fla. 41, 145 So. 842, where it is said,

"When paving assessment is void, failure to object within time limited does not raise estoppel."

And in another place in the opinion:

"We are conscious of the rule to the effect that the doctrine of estoppel has no application when an assessment is wholly void; that is to say, when the assessment is made in such a manner as to render it invalid, or when *constitutional or statutory provisions essential to its validity are completely ignored.*" Gulfview Apartment vs. City of Venice, 108 Fla. 41, 145 So. 842.

Also in Combes vs. City of Coral Gables, 168 So. 524, 124 Fla. 374:

"Rule that taxpayer may waive his right or may be estopped to contest validity of tax lien is not applicable where lien is utterly void."

In the instant case, the holding that appellants are estopped is expressly based on the hypothesis that the assessment is not void, as witness the following quotation from the opinion in the instant case:

"Bearing in mind the premise that no defects in the procedure culminating in the lien rendered them void, we think the combined circumstances reflected in the record establish such acquiescence on the part of the appellee property owner that she may be said to have become estopped."